No. 2091

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS EVANS *Plaintiff in Error*

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error

Brief of Plaintiff In Error

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON

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STATEMENT

This is an appeal from the judgment of the United States Circuit Court for the District of Oregon, Ninth Circuit, directing a verdict for the Defendant. The action was brought by Thomas Evans to recover damages for the loss of his leg, caused by the negligence of the Defendant in backing its train against Plaintiff on a dark night without lights, signals or warning.

The evidence shows that Defendant on the 25th of September, 1909, was operating a steam railway between Portland and Oswego, Oregon, a distance of about nine miles. The train which caused the accident complained of in the Complaint was a local consisting of an engine, tender and two coaches, run upon a regular schedule between Portland and Oswego and way points.

It had long been the custom of those managing the

train, in the management and operation of it, to proceed to Oswego, discharge its passengers and perform its switching operations beyond Oswego, so as to be ready to make the return trip. And this custom had become well established and of common knowledge.

The Plaintiff on the afternoon of September 25, 1909, purchased a round trip ticket from Portland to Oswego, on which ticket he rode from Portland to Oswego arriving there at about 4:30 o'clock P. M. Having spent the evening he started with a companion named Emmett, a witness in the case, to catch the 10:45 train at Oswego, the last train for Portland that night. In approaching the station Plaintiff and Emmett were obliged to take a path which crossed the railroad right-of-way between the station at Oswego and the station called Wilsonia—the latter being about 1300 feet Northerly from Oswego and between Oswego and Portland. While proceeding along this path Plaintiff saw by the side lights of the train that he was endeavoring to take that the train was at Wilsonia, headed for Porland and apparently had left Oswego for Portland. Having no watch and knowing that it was the custom to run this train to Oswego, discharge its passengers, run beyond Oswego and return through Oswego to Wilsonia and assuming that this had been done in the manner in which it was customary to do it, Plaintiff concluded that the train had already left Oswego and was at Wilsonia on its way to Portland. Upon reaching the right-of-way

Plaintiff and Emmett proceeded down the track towards Wilsonia, where the train was being headed for Portland with the engine at the Northerly end of the train. There was nothing to indicate to Plaintiff that the train was about to back up towards Oswego, or would back up towards Oswego, or that anything outside the usual manner of handling the train would occur. While Plaintiff and his companion were hurrying down the track to overtake the train before it left Wilsonia, the Plaintiff was struck by the rear coach of the train which instead of being on its way to Portland was being backed South towards Oswego.

The Defendant Company had caused no bell to be rung announcing the movement of the train and no lights were exhibited at the rear end of the train to warn anyone on the track of the approach of the train and no watchman or other person was stationed at the rear end of the train or anywhere to give such notice. This was the first time that the train had been so operated; while before that time, as above stated, it was the practice of the Company to do its switching beyond Oswego. They had just installed a switch at Wilsonia and on this night for the first time they performed their switching operations at Wilsonia before reaching Oswego. After making a flying switch, the engine being then on the Northerly or Portland end of the train proceeded to push the coaches towards Oswego to deliver the passengers. It was while the train was so proceeding and under the

circumstances above detailed that the accident occurred.

QUESTIONS INVOLVED.

Plaintiff charges defendant with negligently and carelessly backing its train on a dark night without the usual or any lights or signal on the end of the train or without ringing the bell or sounding the whistle, and without giving plaintiff any warning or notice of its approach. After all the evidence was in on behalf of both parties the court directed a verdict in favor of the defendant from which the writ of error is taken.

During the trial of the case three questions arose:

FIRST: What right did plaintiff have on defendant's right-of-way—was he an invitee by implication or was he a mere tresspasser?

SECONDLY: Was defendant negligent?

THIRDLY: Was plaintiff guilty of contributory negligence?

Upon the first two questions the trial court held that there was sufficient evidence to go to the jury; but upon the third question the court held that the evidence showed contributory negligence and was such that a verdict should be directed in favor of defendant.

The error upon which this Writ of Error is sued out- consists in the Court's finding Plaintiff guilty of contribuotry negligence, and in directing the jury to find a verdict for defendant.

PLAINTIFF—AN INVITEE NOT A TRESPASSER

The railroad right-of-way between Oswego and Wilsonia is unfenced, there are no cattle guards or tresspass notices; within that distance of 1300 feet there are four distinct paths crossing the tracks; on the easterly side of the track is an iron foundry employing between 50 and 75 men; on the westerly side is the new town of Oswego. The residents around Wilsonia and Oswego and the public generally have used the railroad track between Oswego and Wilsonia for a great many years, both in passing along and going across, with the knowledge and consent of the railroad company; all of which may be understood from the following testimony:

(TESTIMONY OF ROY FOX, a resident of Oswego for 20 years). Transcript 171-173):

Q. To what extent has the railroad track and right-of-way between Wilsonia and Oswego been used by the public as means of travel—roadway?

A. Well, about 90 our of 100 will travel the railroad. Very seldom see one travel the wagon road.

Q. That is foot passengers or pedestrians?

A. Yes, foot passengers.

Q. What is the condition of the track in between the rails as to being smooth and passable or not?

A. Well I have always found it a pretty good foot path day or night.

Q. Is it ballasted with gravel?

(Testimony of Roy Fox.)

A. No, sir, it is ballasted with dirt. There is some rock in it; once in a while would be a rock that would stick up out of the dirt. There is a beaten path.

Q. How far back has the track been in that condition to your knowledge?

A. As long as I can remember.

Q. What class of people travel over that track from Wilsonia to Oswego on the railroad right- of-way?

A. Everybody. There aint no class at all—the public generally travel it.

Q. Is there any sidewalk between the two towns —the two stations?

A. Between where?

Q. Between Wilsonia and Oswego.

A. No, sir.

Q. There is a county road upon the hill?

A. There is a county road, yes.

Q. But there is no sidewalk?

A. No sidewalk.

Q. Have you seen people traveling night and day?

A. Yes, sir.

Q. All times of the night and day?

A. Yes, sir, I have traveled it myself.

Q. Sir?

A. I say I have traveled it myself that way.

Q. Do you know whether or not the railroad company and the agents there knew of this travel?

(Testimony of James Headrick.)

A. Yes sir, I have met section foremen and I have met bridge carpenters' foreman and I have met the agent, and talked to all of them right on the track—Held conversation with them.

Q. Never seen any sattle guards or tresspass notices?

A. Never have since I can remember anything about it.

TESTIMONY OF JAMES HEADRICK, a resident of Oswego for 18 years (Transcript 201-204.):

Q. To what extent do they use the right-of-way as a means of travel between the two points?

A. Well people generally use it because I suppose that the county road—it was like myself—they would sooner travel the railroad than the county road. It was more convenient for me and suppose they had the same idea.

Q. Has that always during all that time been the better walk?

A. Yes sir.

Q. Has there been a well beaten and well defined pathway between the rails.

A. It has been a leveler road. The other was quite a hill to climb over, and then we generally had it six or seven months of the year pretty muddy. And again it was a little bit nearer from Wilsonia to the other station. Just took the railroad track, at least I did.

(Testimony of James Headrick.)

Q. In what respect was it preferable to the county road?

A. Well it was leveler and no mud; it was a cleaner and decenter walk.

Q. What class of people have you seen using the right-of-way for travel?

A. Well, I saw most all classes—laboring men and business men and all classes travel the road.——

Q. How many paths were there between Wilsonia and Oswego station?

A. There were about four regular paths.

Mr. FENTON—That is that crossed the track, you mean?

A. Yes, sir, about four paths.

Q. So that you have observed people going up and down the track, and also crossing the track, every direction?

A. Oh, yes, yes; I have seen them going.

Q. During all this time did you ever see any school children going along the track there between Wilsonia?

A. Yes, Sir. Mine have traveled it. I lived four years down there. That is, I didn't live there four years—I lived about a year and a half, my family did, down on that bottom of the new bridge.

Q. When was that?

A. It is two years ago—three years ago, we went on there.

(Testimony of James Headrick.)

Q. How many children did you have there?

A. Four.

Q. Going to school?

A. Yes, sir.

Q. And what proportion of that year and a half did they travel this track to school?

A. Well, about nine months of the year.

Q. Every day?

A. Nine months school and they went every day of school.

Q. Every day?

A. Pretty much every day.

Q. Was that their usual customary way of going to school?

A. Well, I think so, yes; that is; from Wilsonia. The other road was muddy, and they took the railroad track for it, just like myself.

Q. Was there any knowledge on the part of the railroad company of the use there by the public? Do you know whether the railroad men knew that the public was using that track for travel there?

A. Well, yes, they must have known it. I have talked to them on the road myself.

Q. Who?

A. Why the railroad officials, some of them. The agent there at Oswego, he knew it. I have been there with him when he would be down looking at the cars and such things as that, down near Wilsonia there.

(Testimony of Thomas Fox.)

Q. Has there been any protest or objection against that use?

A. I never heard none.

Q. Ever any cattle-guards or trespass notices up?

A. No sir.

Q. Has the track ever been fenced?

A. No, sir.

TESTIMONY OF THOMAS FOX, resident of Oswego for 20 years (Transcript 139.):

While I lived down there, me and my family and the general public that was afoot traveled the railroad track. I would say, anyhow, pretty near 90 per cent of them would travel the railroad track. I always did myself, and my family. The children went to school. We traveled the railroad track, excepting going across the trestle. We didn't allow our children to go across the trestle if we knew it, but they would cross the bridge, and come back on the railroad, and go from Wilsonia up to the schoolhouse, on the railroad track.

TESTIMONY OF J. T. HARBIN, a resident of Oswego and a blacksmith. (Transcript 186-188.):

Q. Are you familiar with the Southern Pacific right-of-way between Wilsonia and Oswego?

A. Fairly, Yes, sir.

Q. How long have you been familiar with that?

A. About three of four years.

(Testimony of J. T. Harbin.)

Q. To what extent has the public used that right-of-way as a thoroughfore for travel?

A. Do you mean from my place to Oswego?

Q. No, from Wilsonia to Oswego.—The railroad right-of-way?

A. Well they used that—well as a general thing they used it for thoroughfore, that is the public walking. I use it twice a day, as a general thing, myself.

Q. You what?

A. I usually use it about twice a day.

Q. What condition was the walk in between the rails from Wilsonia on south?

A. Well, it was just fair walking. There was nothing extra, nor it was not very bad; it would just be fair walking.

Q. Well, was it the best walk there was between Wilsonia and Oswego.

A. In the winter time it was, yes. More convenient because the wagon road was a hill they had to climb, and we generally avoided the hill as much as possible.

Q. Have you seen other people using it?

A. O, yes, frequently——

Q. Do you know about children going to school that way?

A. My children all went that way.

TESTIMONY OF CHARLES N. HAINES, resident of Oswego since 1881. (Transcript 159.):

(Testimony of Charles N. Haines.)

Q. Are you familiar with the railroad track of the Southern Pacific Company from Oswego to Wilsonia?

A. Yes, sir——

Q. To what extent do the people use that as a thoroughfare, if you know.

A. People use it as a thoroughfare in preference to the county road. They use it as a general thoroughfare, pretty near. I see people there. I have seen them get off the train, and going down that way towards Wilsonia. Instead of going out on the road, they will take the railroad track nearly every time, in preference to walking the county road.

TESTIMONY OF J. M. COON.—*DEFENDANT'S OWN WITNESS.* Transcript 313.):

Q. I will ask you to state to the jury what the fact is if you know about whether or not there was any travel after ten o'clock at night between Oswego and towards Elkrock, down where Wilsonia now is, between the rails—using that as a footpath?

A. Well, I never was there after ten o'clock at night and couldn't say; that is, I don't think I ever was there that late in the evening.

Q. Well, after dark was that track used as a foot path by the people lengthways?

A. Well, I don't know. I think it was used to a certain extent. I know it was used in the day time and I think people that lived down that way went up

(Testimony of J. M. Coon.)
and down the track after night as well as daytime, to keep out of the mud in the winter time and out of the dust in the summer time.

Gardner et al. v. Trumbull 94 Fed. 321: A child while upon the track of defendant, was run over by defendant's train. There was evidence tending to show that the track at that place and for a considerable distance in either direction therefrom, had been used for a long time by the people and villagers who lived in considerable numbers along the right-of-way and on both sides thereof, as a footpath for the purpose of going to and from the city of Trinidad, and to and from their work, and to and from each others' houses, either on business or as visitors. The trial court directed a verdict in favor of the defendant on the ground that the child was a trespasser. In reversing the decision the appellate court said: "When, therefore, for a considerable period, numerous persons have been accustomed to walk across the railroad track or along a railroad track between given points either for business or pleasure, railroad engineers should take notice of such practices, and when approaching such places, should be required to exercise precautions to prevent injuring them. Know-

ing the usage which prevails, they may reasonably be required to anticipate the probable presence of persons on or near the track at such places, and to be on the lookout when their attention is not directed to the performance of their other duties. The natural impulses of a person who has a proper regard for the welfare of others would prompt him to thus act."

Cahill v. Railroad Company 46 U. S. app. 85-89, 20. C. C. A. 186. and 74 Fed. 287: "That in places on railroad tracks where people are accustomed to come and go frequently in considerable numbers and where, by reason of such custom, their presence upon the track is probable, and ought to be anticipated, those in charge of passing trains must use reasonable precautions to avoid injury, even to those who, in a strict sense might be called trespassers."

Felton v. Aubrey, 43 U. S. App. 278-296, 20 C. C. A. 445 and 74 Fed. 359 (6th Circuit):

If a railroad company "Has permitted the public for a long period of time habitually and openly to cross its tracks at a particular place or use the track as a pathway between particular localities, it can not say that it was not bound to anticipate the presence of such persons on its track and was therefore not under any obligations to operate its trains with any regard to the safety of those there by its license."

In a very able opinion by Chief Justice Lord in Ward v. Southern Pacific Company, 25 Or. 437, it is said: "A railroad company has the right to the ex-

clusive use of its track unless a right-of-way or a foot path over it has been acquired by its consent, express or implied, or a joint use has been reserved to the public as at a public crossing. There is no doubt that if the company permitted the public for a long time, to travel or habitually pass over its track, at some given point, or use it as a footpath between different points, without objection or hindrance, its consent or acquiescense in such use might be presumed, and it would be bound to manage and run its trains with reference thereto. In such cases the company and the people have a common right or joint use in the track as a public use, and the right of each must be regarded."

Teakle v. San Pedro, L. A. & S. L. R. Co., 90 Pac. 407 (Utah.): "From the authorities we are inclined to adhere to the rule already announced by this court that when for a considerable period numerous persons have been accustomd to walk across or along a railroad track in a thickly settled community or populous city, as shown by the evidence in this case, train operatives ought to be required to take notice of such usage, and to anticipate the probable presence of persons on or near the track, and to observe a reasonable lookout when their attention is not directed to a performance of other duties." In the Teakle case the deceased was injured while walking the defendant's track through its yards, which were inclosed and which had been generally used and traveled by men,

women and children as a thoroughfare for eight years or more without objection. The tracks were along a thickly populated portion of the city; there was a notice warning trespassers to keep off, but the employees of the defendants knew of the use of the track by the public and made no objection.

Cedarson vs. O. R. N. Co., 38 Ore. 362: Deceased was killed while traveling over a wagon road running on defendant's right of way and in close proximity to defendant's track. While so walking along, defendant's car left the track and struck him. The court said: "The wagon road at that point was in frequent and constant use by Seufert Bros, Company's employees, both on foot and with teams, especially during the fishing reason, and more or less by the general public. This state of affairs continued for a long time which, taken in connection with the manner in which the wagon road was constructed, and its proximity to the side track, tends in some measure at least, to show that defendant was cognizant of the conditions, and that they so existed with something more than its tacit consent, or, rather, that they existed with their approval. If the decedent was licensed by invitation or inducement then it was incumbent upon the defendant to exercise active vigilence in respect to him. It was forewarned, and should have been forearmed." Other cases expressing the same view are Taylor vs. Canal Company stl. Atlantic 43; Barry vs. Railroad Company, 92 New York, 289-292;

Roth vs. Depot Company, 13 Washington, 525, and cases there sighted; Frick vs. Railway Company, 75 Mo., 595-610.

The rule as given in the above cases, is supported by abundant authority and good service. where railroad company without a single protest allows people generally to use its track as a thoroughfare in such manner and for such time that they are led to believe that they are welcome, the company should not then be allowed to run its trains in absolute disregard of those conditions. A proper regard for human safety, demands that they should anticipate the presence of pedestrians at these places and use reasonable diligence to avoid injurying them; the amount of diligence to depend upon all the surrounding conditions; and in each case to be determined by jury. Upon this question, therefore, the court properly held that there was sufficient evidence to take the case to the jury.

DEFENDANT WAS NEGLIGENT

Assuming that the jury should determine that plaintiff was an invitee by implication; That defendant should have anticipated his presence upon the track, and that defendant should have given him reasonable warning of the approach of the train—taking up the next question, the evidence shows that;

Defendant failed to give plaintiff due notice and a timely warning of the approach of its train—

—All the witnesses agree that the night was dark.

(Testimony of Thomas Evans.)

It appears very clearly from the evidence that as the train backed down there in the dark, there was no light, signal or lookout upon the approaching end of the train; that there was no bell rung nor whistle sounded, and the defendant made no effort whatsoever to warn plaintiff of its approach.

TESTIMONY OF THOMAS EVANS (plaintiff) (Transcript 31.):

Q. Now state, was there anybody on the rear end of that train when you were struck?

A. No. sir.

Q. Was there any light there or anything?

A. Nothing at all.

Q. Well, were you looking and listening?

A. Yes, sir. I was looking straight ahead.

TESTIMONY OF MR. EMMETT. (Transcript 71-74.):

Q. Well, now, sir. What was the first thing you noticed?

A. The first thing I noticed?

Q. Yes. In regard to the train after you had got on the track?

A. When I got on the track?

Q. After you got on the track?

A. After I got on the track?

Q. Yes. When he was struck.

A. When he was struck. There was a man came

(Testimony of Mr. Emmett.)

to the door with a lantern just as the train struck him and hallooed "lookout, lookout."

Q. Just as the train struck him?

A. Just as the train struck him.

Q. Where did this man come from?

A. Just came right out of the coach.

Q. Out of what part of the coach?

A. The rear end, right out the door.

Q. The end, you mean, towards you?

A. Yes, sir.

Q. Towards Evans? Well, now, which happened first—did the train strike Evans first, or did the man come out of the coach first?

A. There wasn't but very little difference. You could hardly tell.

Q. Just tell the jury what you saw about that just as near as you can.

A. Well, just about the time the train struck the boy ,the man came to the door with the lantern, and he hallooed "look out" and it just knocked the boy down and ran over his leg And I crawled down to see where he went to. I never expected to see him alive.

Q. JUROR—How far were you from the train then?

A. About eight or ten feet.

Q. Do you know who that was that had the lantern?

(Testimony of Mr. Emmett.)

A. Well, I suppose it was the conductor.

Q. Did you see anything of the brakeman?

A. No, sir.

Q. Well, now, up to the time that the man came out of the rear door with the lantern, up to that time was there any light on the rear of that train?

A. No, sir.

Q. You swear to it?

A. There was no light.

Q. Was there any lookout?

A. All the light you could see was what was shining through the glass of the door.

Mr. FENTON—Through what?

A. He would have to look up to see the light shining through the glass of the door.

Mr. FENTON—Through the panel of the door.

A. Yes, sir.

Q. You saw that afterwards did you?

A. Just as the door opened I could see, when the train was coming and it didn't any more than give me time to get off.

Q. Were you looking all the time as you were coming down there to see if there was any train coming or in the way?

A. I don't know if I would have seen it if the door hadn't opened, myself.

Q. Was it pretty dark?

A. Fairly dark, yes.

(Testimony of Mr. Worthington.)

Q. Now ,was there any whistle blown or any bell rung there right before that accident?

A. Well, I didn't hear any myself.

Q. Well, were you in a position where you would have heard if it had been sounded?

A. I expect I would.

Q. Was there any signal of any kind given so as to warn Evans or yourself of the backing of that train?

A. Not that I know of.

TESTIMONY OF MR. WORTHINGTON, who was a passenger, sitting near and facing the end of the coach that struck plaintiff. (Transcript 128.):

Q. Now, just tell the jury what the first thing was that you noticed, and what you saw and heard at the time of that accident.

A. Well, the first thing I heard was a signal for the train to stop; and, well, before that, before the signal, I seen the conductor, Mr. Keyser, come through the coach; he had a lantern in his hand. He stepped to the door, and just as he opened the door and stepped on the platform he said "Lookout Lookout"; and at that why he stopped the train—give a sigal to stop the train.——

Q. Which side of the train were you on?

A. I was on the river side.

Q. And the conductor came right there; and you

(Testimony of Mr. Worthington.)

were sitting here facing the back end and he came through and opened the door?

A. Yes, sir

Q. How long after he had opened the door was it before he halloed?

A. Just as soon as he got on the platform he says, "lookout, lookout," at that he——

Q. Did he hallo in a frightened sort of way—shout to them?

A. Well, he halloed pretty loud.

Q. Well, sir, did you hear the bell ring?

A. I did not.

Q. Or the whistle sound?

A. No, sir.

Q. Would you have heard—were you in a position so you probably would have heard?

A. Well, I could not particularly say about that because I was not paying much attention.

(Page 134, Cross Examination.)

Q. And you saw the conductor come through with his lantern, and you saw him go outside and call out to somebody you didn't know who it was.

A. No, sir.

Q. "Lookout, Lookout?"

A. Yes, just as he opened the door he stepped out and says "Lookout, Lookout."

TESTIMONY of MR. ELSTON, a passenger on the train standing on the platform between the two

(Testimony of Mr. Elston.)

coaches at the time of the accident. (Transcript 107.):

Q. You heard the signal to stop plainly?

A. I did.

Q. Did you hear and bell rung in the engine?

A. Well, sir, that I couldn't say. I don't remember of hearing any bell at all. There was nothing that I remember of.

Q. Did you hear any whistle blown?

A. I did not.

Q. Were you in a position where you would have been likely to have heard a bell or whistle?

A. I was in a position to have heard it, but at the same time I would not probably have noticed it, not thinking anything at all.

Defendant's brakeman Mr. Scruggs, admitted that he was inside of the coach with the markers or colored lights at the time of the accident. There was some evidence that the door of the coach possessed a glass panel; and that coaloil lamps were burning inside; but aside from that ,defendant's contention that there was a light or lookout on the end of the coach rests solely upon its claim that the conductor was there with his lantern from the time the train left Wilsonia until plaintiff was struck. Failing to produce anybody that saw or knew he was there, defendant's testimony on this point is confined to the evidence of Mr. Kayser, the conductor. After testi-

fying that he was on the platform, Mr. Kayser said: (Transcript 332.):

"And in the shadow of the darkness I saw two men coming down the track, and they were running, and I called to them to look out for the cars, the train is backing up, and one of the men got off the track, and as he did he spoke to his partner—I didn't know who they were at that time—to get off the track! and his partner used some profane language, something like saying he would catch them anyway. But I saw that he was not going to get off the track, and I reached up and stepped on the threshold of the door—I had to reach the cord; it is about four inches higher than the platform, the threshold is and it makes it easier to reach it that way—and just before we stopped we caught this Mr. Evans right in the face."

That a man should use profane language and say that he would catch the train anyway, after he had been notified by both Emmett and the Conductor, that the train was coming right at him, seems somewhat incredible.

The evidence of Mr. Evans, Mr. Emmett, his companion and Mr. Worthington, a passenger on the train all go to prove that the conductor did not reach the platform until the plaintiff was struck. Considering this evidence together with the above unusual statement of Mr. Kayser, it is very clear that the conductor did not arrive with his lantern until too late, and that defendant failed to provide any light

or lookout and failed to give plaintiff timely warning—And the court properly held that there was sufficient evidence to go to the jury on the question of defendant's negligence.

WAS PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE?

Before reaching the track, plaintiff could see, from the side lights, the train at Wilsonia, headed for Portland. This was the last train that evening and plaintiff and Worthington were on their way to take it. They had no watch and did not know the exact time; yet they knew it was about starting time. It had not been customary for defendant to back its train from Wilsonia to Oswego in the night time; and these two men knew of the long established custom of the company to perform its switching operations at Oswego. It was dark; there was no lights or lookout on the end of that train to enable them to see, and no bell rung or whistle blown to enable them to hear. If but a single inference can be drawn from these facts, it is indeed the inference that, because defendant failed to provide the ordinary and only means of seeing and knowing, plaintiff was unable to see and know of the approach of the train.

It is true that there was evidence to the effect that coal oil lamps were burning inside the coach, and that there was a glass panel in the door of the coach, and that the exhaust of the engine on the opposite end of the train was making some noise—but plaintiff

had a right to assume that defendant would provide the usual and necessary lights and warning on the end of that coach. It was not incumbent on him to stop at every step and peer ahead through the darkness in the attempt to discover the faint reflection of coal oil lamps in the panel of the door; nor was it incumbent on him to stop and try to determine by the sound of the engine on the opposite end of the train, several hundred feet ahead, whether a train that he could not see was coming towards him. He was in a hurry; he had no reason to assume that defendant would be backing the train from Wilsonia to Oswego in that unusual manner; he had a right to expect in the event of the backing of the train, sufficient, proper and timely warning would be given him.

The reflection or glow of the light in the panel of the door of a coach, is only discernible on a dark night at a very close range. The panel of the coach door sets high. A person traveling along a path on a dark night must give most of his attention to the path, lest he stumble or get off his course. When the position of the engine on the train, the custom of the company, the absence of lights or lookouts, and every circumstance indicate that the train is proceeding, or is about to proceed, in the opposite direction, an ordinarilly careful man would be less inclined to discover the faint glow in the door panel, than if all the circumstances should put him on his notice.

Defendant did e verything in its power to lead

plaintiff to believe that the train was on its way to Portland; it did nothing whatever to notify plaintiff that it was proceeding to Oswego. Is it possible that a railroad company will be allowed to lull a person into a feeling of safety and then slip upon him in the dark in this manner, and escape liability as a matter of law, because it might have been possible for him to see a faint glow in the door panel, if he had been looking skyward just an instant before being struck? Reasonable and ordinary care does not demand the highest degree of care or the discovery of every possible source of danger. Ordinary care in this case demanded that plaintiff pay attention to his course and to look for the ordinary signs of danger.

All the evidence shows that plaintiff did not see the reflection in the door panel; but if it be conceded, for argument, that he did see it, what right then, did he have to suppose that the train was coming toward him. There was no signal or lookout to warn him. Practical experience teaches us that, when a reflection or steady light in the night is moving directly away or is coming directly toward a person, it requires very close observation and is difficult to tell which way it is moving. When everything indicates that the train is going in the opposite way, such a light is no warning whatever.

The fact that Emmett did not see the light in the panel but that he saw the conductor's lantern when the door was opened, just as plaintiff was struck, and just in time for Emmett to escape, is good evidence

that Emmett was looking and a strong presumption that the reflection through the panel of the door was insufficient warning under all the circumstances. Had the conductor appeared at the door with his lantern an instant sooner it is reasonable to assume that plaintiff, who was about ten or fifteen feet ahead of Emmett, would have seen in time to escape also.

It was error for the court to direct a verdict for defendant, on the ground of contributory negligence. That question as well as that of defendant's negligence, should have been submitted to the jury under proper instructions.

In Thompson on negligence, vol. 1, page 409 it is said:

"In the courts of the United States, it is frequently said that the trial court is bound to submit the case to the jury unless no recovery could be had upon any view that could properly be taken of the facts which the evidence tends to establish." Again, "This necessarily results from the premise that in every system of jury trial, and epecially in the United States, where the right of trial by jury in actions at common law is guaranteed by constitutional sanctions, the judge cannot presume to determine whether a given proposition of fact has been proved or disapproved, where the evidence is conflicting, or where the credibility of witnesses is involved; for so to do would invade the province of the jury and infringe the constitutional right of trial by jury."

Jones vs. Tennessee & C. Ry. Co., 128 U. S. 445, in reversing a directed verdict for defendant, the court said: "Plaintiff himself states that he was in the depot of defendant on business, that the passenger platform alongside the track which ran between it and the depot; there was also a sidetrack that went through the depot; that he passed out of the depot the usual way, and was struck between the wall of the depot and the platform. He further says that the way he was going he could not see a train approaching from the each, because there was a car on the sidetrack, and he had no warning of an approaching train, althought he listened as he went out of the depot. There is also some evidence that there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished.

"On the other hand, there is some testimony to show that the plaintiff ran carelessly through the depot ,that he knew the train was approaching and that he might have guarded himself against it if he had stopped at the exit of the depot long enough to have looked about him. But we think these are questions for the jury to determine. We see no reason so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of facts, why it should not decide such questions as these as well as others. There is nothing in a case in which it is conceded, fully and unreservedly that the

defendant company is in fault on account of the manner of running its trains, such as the high rate of speed and other careless matters mentioned by the court in its instructions, which should justify the court in refusing to submit to the jury the question whether the defendant company is relieved from liability incurred by it by reason of the acts of the plaintiff, showing that in some degree he may not have been as careful as the most cautious and prudent would have been. Instead of the course here pursued a due regard for the respective functions of the court and the jury seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would secure a sound verdict. We think this case is covered by that of Kane vs. N. Northern Central Ry. Co., Ante, 91."

The doctrine in this case and the Kane case is again affirmed in Dunlap vs. North Eastern Ry. Co., 130 U. S., 649, in which last case the appellate court again reversed a directed verdict for the reason set out in the Jones and Kane cases

This doctrine is so well established that further authority seems unnecessary.

We, therefore, submit that the Court erred in directing a verdict for defendant; that the question of contributory negligence is one for the Jury; and under the law and evidence the case should have been submitted to the jury with proper instructions.

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